

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE, N.W.

P.O. BOX 7566

WASHINGTON, D.C. 20044-7566

(202) 662-6000

LECONFIELD HOUSE

CURZON STREET

LONDON W1Y 8AS

ENGLAND

TELEPHONE: 071-495-5655

TELEFAX: 071-495-3101

TELEFAX: (202) 662-6291

TELEX: 89-593 (COVING WSH)

CABLE: COVING

WRITER'S DIRECT DIAL NUMBER

EX PARTE OR LATE FILED

BRUSSELS CORRESPONDENT OFFICE

44 AVENUE DES ARTS

BRUSSELS 1040 BELGIUM

TELEPHONE: 32-2-512-9890

TELEFAX: 32-2-502-1598

DOCKET FILE COPY ORIGINAL

October 17, 1994

RECEIVED

OCT 17 1994

BY MESSENGER

Mr. Andrew S. Fishel, Managing Director
William E. Kennard, Esq., General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Notice of Ex Parte Violation by Pacific Telesis
and Request for Investigation
Gen. Docket 90-314

Dear Messrs. Fishel and Kennard:

On behalf of American PCS, L.P. d/b/a American Personal Communications ("APC") and pursuant to Section 1.1214 of the Commission's Rules, 47 C.F.R. § 1.1214 (1993), we hereby notify the Commission of a violation of the Commission's rules and request an appropriate investigation.

In an address on October 12, 1994 to the United States Telephone Association ("USTA") annual conference that we understand was attended by the Chairman, all four Commissioners and a significant number of FCC staff members,^{1/} the chief executive officer of Pacific Telesis, Phillip Quigley, openly addressed the merits of three requests for pioneer preferences. The merits of any pioneer preference request is a restricted matter pending before the Commission.^{2/} As to this clearly restricted issue, all ex

^{1/} See Communications Daily, Oct. 13, 1994, at 2 (Chairman and all four Commissioners in attendance, in addition to, among others, the chief and deputy chief of the Common Carrier Bureau, and advisors to the Chairman and each Commissioner). No APC representative was in attendance.

^{2/} Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order, 9 F.C.C. Rcd. 1337 (1994), recon. pending; see Amendment of the Commission's Rules to Establish New Personal Communications Services, Tentative Decision, 7 F.C.C. Rcd. 7794, 7813 (1992) (merits of preference decision is restricted). APC's pending

Mr. Andrew S. Fishel
William E. Kennard, Esq.
October 17, 1994
Page 2

parte comments, even if reported in notices filed with the Commission, are absolutely prohibited.

According to published reports, Mr. Quigley delivered a prepared speech criticizing the legitimacy of the Commission's decision to award a preference to APC and Cox Enterprises, Inc. He reportedly stated that Omnipoint Communications, Inc. was "the only legitimate pioneer among the three" companies. He also stated that "there's no way [the pioneers'] technical contributions merit a billion-dollar discount."^{3/}

Mr. Quigley went on (1) to argue that APC's preference was "unearned," (2) to further mischaracterize the Commission's actions in connection with its pioneer preference decisions and (3) to continue Pacific Telesis' deceptive public lobbying effort to defeat the enabling legislation for the Uruguay Round of the General Agreement on Tariffs and Trade.^{4/}

Pacific Telesis is aware of the ex parte rules. Yet, apparently with premeditation and by design, it crafted its chief executive's speech to address the merits of a pending restricted proceeding to the Chairman, Commissioners

application for an initial authorization based upon its finalized pioneer preference also is a restricted proceeding. See Petitions to Deny Filed Against Broadband PCS Applications, Public Notice 50180 (Oct. 13, 1994). Pacific Telesis is familiar with these rules; it has filed its own unfounded complaints against APC and has briefed certain of these issues for the United States Court of Appeals for the D.C. Circuit.

^{3/} Quigley Again Raises Objections Over Pioneer's Preference 'Fiasco', Washington Telecom Week, Sept. 14, 1994, at 9-10; see also Quigley Rails Against Critics Who Charged RBOCs with S. 1822's Death, Washington Telecom Week, Sept. 14, 1994, at 7-8.

^{4/} See Quigley, Washington Telecom Week, Sept. 14, 1994, at 9-10 (set out in Appendix A to this letter).

Mr. Andrew S. Fishel
William E. Kennard, Esq.
October 17, 1994
Page 3

and FCC staff.^{5/} It is difficult to imagine a more calculated violation of the Commission's rules. Given the deliberate nature of this presentation to Commission personnel, we believe the Commission should inquire whether other Pacific Telesis employees attending the USTA convention also attempted to make similarly impermissible ex parte presentations to Commission personnel.

The purpose of this letter is not to reply to the errors in Mr. Quigley's remarks, which are legion. Rather, we bring this clear ex parte violation to the Commission's attention for it to take appropriate action.

Respectfully submitted,



Jonathan D. Blake
Kurt A. Wimmer

Attorneys for American
Personal Communications

cc: Gen. Docket 90-314
Michael K. Kellogg, Esq. (by hand)
Courtesy copies: Parties of record
Gen. Docket 90-314

^{5/} This formally prepared speech could not conceivably be considered a "casual" or "incidental remark" at a social occasion; nor can it be analogized to a "public speech" by an FCC decisionmaker that "avoid[s] discussion of the merits or outcome of the restricted proceeding"; nor can it be considered a communication "regarding 'general industry problems'" that does "not deal with the merits of the restricted proceeding." Cf. Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, Report and Order, 2 F.C.C. Rcd. 3011, 3013-14 (1987). Here, a formal speech was prepared beforehand, presumably with the knowledge that a captive audience of FCC decisionmakers would be subjected to it, and quite clearly dealt with the merits of a restricted proceeding. It was "intended to be [a] presentation" and should be treated as such. Id. at 3014.

Mr. Andrew S. Fishel
William E. Kennard, Esq.
October 17, 1994
Page 4

APPENDIX A

"Then the FCC said: 'We may give away some licenses to companies that have done distinguished R&D [research and development] in the field of PCS.' But as things turned out, they gave away one of the best licenses in the lot -- a 30 MHz license. That means only one 30 MHz MTA remains, and that creates a scarcity factor in the bidding process . . . This pioneer preference thing then starts to really mess with the competitive balance.

"When this was pointed out, fair-minded people agreed. The FCC rescinded the whole scheme and demanded that the former winners pay 90% of market value -- still a sizable and unearned break, but better than free.

"Now the really depressing part. Here's what happened: A couple of weeks ago, the formula by which their license fee would be calculated was changed. It had been proposed by the FCC and publicly debated, but now it was changed substantially and appended to the GATT trade agreement. As you probably know, members of Congress can only vote up or down on trade treaties. There are no amendments. This has competitively harmed PCS bidders in three large markets."